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U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF S-T- INC.

DATE: MAR. 8, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology consulting services, seeks to permanently employ the Beneficiary as a software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition on July 9, 2015. The Director concluded that the record did not establish the *bona fides* of the job offer, the Petitioner's continuing ability to pay the proffered wage, or the Beneficiary's possession of the qualifying experience for the offered position and the requested classification.

The matter is now before us on appeal. The Petitioner submits additional evidence and argument in support of the *bona fides* of the job offer and its ability to pay the proffered wage. Upon *de novo* review, we will dismiss the appeal.

## I. THE BONA FIDES OF THE JOB OFFER

An employer "desiring and intending" to employ a foreign national in the United States may file an immigrant petition on his or her behalf. INA § 204(a)(1)(F), 8 U.S.C. § 1154(a)(1)(F).

A petitioner must intend to employ a beneficiary pursuant to the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966) (upholding a petition denial where a petitioner did not intend to employ a beneficiary as a live-in domestic worker pursuant to the accompanying labor certification). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.3.

The instant petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The labor certification states the area of intended employment of the offered position of software engineer as [redacted] Florida, the Petitioner's headquarters. The labor certification also states that the offered

position involves "travel to various unanticipated locations throughout the U.S. for different short & long term assignments."

A. The Purported Discrepancy between the Petitioner's Numbers of Employees and Visa Petitions

The Director's request for evidence (RFE) of December 3, 2014 requests additional evidence of the Petitioner's intention to employ the Beneficiary in the offered position. The RFE states the Petitioner's filing of 129 petitions for immigrant and nonimmigrant workers with U.S. Citizenship and Immigration Services (USCIS) since December 5, 2011. However, on the Form I-140, Immigrant Petition for Alien Worker, the Petitioner stated its employment of only 31 employees.[1]

The Director found that the difference between the Petitioner's numbers of visa petitions and employees cast doubt on its intention to employ its beneficiaries. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). The Director apparently suspected that the offered positions stated in the petitions did not exist, or that the beneficiaries would be employed in the offered positions by businesses other than the Petitioner.

USCIS records do not support the Petitioner's explanation in its February 6, 2015, letter that the beneficiaries of about 65 approved H-1B nonimmigrant petitions "never joined the petitioner due to employee/consulate issues (subsequently withdrawn)." However, USCIS records also do not support the Director's finding that the amount of visa petitions filed by the Petitioner indicates a lack of intention to employ the Beneficiary in the offered position.

USCIS records indicate the Petitioner's filing of 127 nonimmigrant and immigrant visa petitions from December 5, 2011 until the issuance of the Director's RFE on December 3, 2014.[2] USCIS records identify 98 of the 127 petitions as petitions for H-1B nonimmigrant workers. Like the instant petition, the remaining 29 petitions are I-140 petitions for H-1B workers of the Petitioner.

USCIS records also indicate that 39 of the Petitioner's 98 H-1B petitions were denied, revoked, or rejected. The Petitioner filed the remaining 59 H-1B petitions on behalf of 39 people, as 20 petitions sought extensions of status for existing employees. In addition, the Petitioner submitted evidence of its withdrawal of five H-1B petitions between 2012 and 2014.[3]

The record does not indicate a material discrepancy between the Petitioner's stated employment of 31 people and its filings since December 5, 2011 of H-1B petitions for 39 people and I-140 petitions for 29

[1] The Petitioner's number of employees varies in the record. The Form I-140 and accompanying labor certification state the Petitioner's employment of 31 workers. However, in a February 6, 2015, letter in response to the Director's RFE, the Petitioner stated its employment of 25 people.

[2] The Director's petition count of 129 appears to have included two Form I-290Bs, Notices of Appeals or Motions.

[3] It is unclear whether three of the Petitioner's withdrawal requests were effective. USCIS records indicate that revocations of the approvals of the three petitions occurred within days of their purported withdrawals by the Petitioner. However, USCIS records also indicate the Petitioner's withdrawal of an additional two H-1B petitions.

of those people. The Petitioner's Forms W-2 for 2013 and 2014 indicate payments in one or both years to 37 of its 39 H-1B beneficiaries and to 26 of its 29 I-140 beneficiaries. The record therefore does not indicate the Petitioner's filing of petitions without intentions to employ their beneficiaries.
Thus, the record does not support the Director's finding that the amount of visa petitions filed by the Petitioner indicates a lack of intention to permanently employ the Beneficiary in the offered position.

B. The Permanent, Full-Time Nature of the Offered Position

The Director's RFE sought: the address of the Beneficiary's intended worksite; copies of contracts under which she would be employed; and identification of the entities that would pay her and control her work.

In response to the RFE, the Petitioner submitted the February 6, 2015, letter from its former president/sole shareholder.[4] The letter states the company's intention to permanently employ the Beneficiary in the offered position on a full-time basis. The letter also states the Petitioner's intention to pay her proffered wage and control her work while she performs the job duties of the offered position at contracted client sites. The letter states: "Once a particular software development-consulting project is completed, the contract is effectively over and the Software Engineer is then assigned to another project at another site or at the petitioner's development projects."

The Petitioner also submitted a sample copy of a client contract for its services, effective January 2, 2015. However, the Director faulted the contract and other documentation submitted by the Petitioner for failing to identify the Beneficiary as a worker on the project or to specify: her rate of pay; her hours; the length of her employment; the worksite address; and which entity would pay her. Noting that the sample contract became effective after the petition's priority date, the Director also found that the document did not evidence "a job offer available to the beneficiary at the time this petition was submitted to USCIS."

In *Matters of Amsol, Inc.*, 2008-INA-00112, 2009 WL 2869970 (BALCA Sept. 3, 2009), the Board of Alien Labor Certification Appeals (BALCA) considered the *bona fides* of job offers similar to the instant position. As in the instant case, the employer in *Amsol* sought to employ software engineers from its headquarters and at other "unanticipated" client sites in the United States. *Amsol*, 2009 WL 2869970 at *3.

The DOL in *Amsol* stated its initial inability to determine whether the offered positions constituted full-time, permanent jobs because the record lacked evidence regarding: specific clients for whom the beneficiaries would work; their proposed lengths of employment; and the effect of terminations of client

[4] Online government records indicate removal of the letter's signatory as the Petitioner's president and corporate secretary on July 27, 2015, shortly before the filing of the instant appeal. *See* Fla. Dep't of State, Div. of Corps., at [redacted] (accessed Jan. 6, 2016). A copy of the Petitioner's 2013 federal income tax return, the most recent return of record, identifies the letter's signatory as the corporation's sole shareholder. The record does not indicate whether the signatory remains the Petitioner's sole shareholder.

contracts on their status and compensation if no imminent re-assignments existed. *Id.* The DOL requested additional evidence from the employer, including copies of contracts under which the foreign nationals would be employed. *Id.*

The employer in *Amsol* provided copies of client contracts under which the foreign nationals worked. *Id.* at *9. However, the DOL denied the labor certification applications, finding that the contracts did not provide addresses, job duties, or work schedules as requested. *Id.* In vacating the DOL's decisions, BALCA stated: "While the Employer has the burden of proving that the job opportunity is permanent and full-time, requiring an employer to change the nature of its contracts and how it does business in order to meet a specific demand is not realistic." *Id.*

The DOL also found that the employer in *Amsol* did not address the effect of client contract terminations on the status and compensation of the foreign nationals. *Id.* However, BALCA found that tax documentation and copies of numerous client contracts submitted by the employer demonstrated its generation of ongoing business sufficient to continually employ the foreign nationals. *Id.*

In the instant case, the Director erred in requiring the Petitioner to submit evidence of the Beneficiary's intended worksite address and contracts under which she would work in the offered position from the petition's priority date. As BALCA stated in *Amsol*, "requiring an employer to change the nature of its contracts and how it does business in order to meet a specific demand is not realistic." *Amsol*, 2009 WL 2869970 at *9.

Moreover, as the Petitioner argues, an immigrant visa petition represents an offer of future employment. USCIS regulations do not require the Beneficiary to currently work for the Petitioner in the offered position, or even her current physical presence in the United States. The Petitioner's inability to produce contracts and details of the Beneficiary's future work assignments does not preclude the Petitioner's intention to employ her in the offer position.

While the Petitioner need not provide contracts and proposed work assignments specific to the Beneficiary, it must establish the existence of a valid job offer as of the petition's priority date. It is therefore reasonable to expect evidence of prior and ongoing development projects on which the Beneficiary could have worked in the offered position. However, unlike the employer in *Amsol*, the Petitioner submitted a copy of only one client contract dated more than two years after the petition's priority date. The record therefore does not establish the Petitioner's intention to permanently employ her in the full-time offered position from the petition's priority date onward.

The Petitioner submitted tax documentation indicating its generation of substantial business and copies of payroll records indicating regular monthly payments to the Beneficiary and to other employees for full-time services rendered in 2014. These materials demonstrate the Petitioner's general business activities. However, the materials do not establish its intent to employ the Beneficiary in the specific offered position of software engineer.

The Petitioner did not submit sufficient evidence to establish its intention to employ the Beneficiary in the offered position on a permanent, full-time basis. We will therefore affirm the Director's finding that the record does not establish the *bona fides* of the job offer.

## II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, the accompanying labor certification states the proffered wage of the offered position of software engineer as $97,500 per year. The petition's priority date is December 17, 2012, the date the DOL received the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).[5]

The record before the Director closed on February 25, 2015, with his receipt of the Petitioner's response to his RFE. At that time, required evidence of the Petitioner's ability to pay the proffered wage in 2014 was not yet available. We will therefore consider the Petitioner's ability to pay only in 2013, the year of the petition's priority date.[6]

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[7]

In the instant case, the Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, regarding its employment of the Beneficiary in 2012 and 2013. The Forms W-2 indicate the Petitioner's payments to the Beneficiary of $40,000 in 2012 and $49,000.04 in 2013.

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[5] The Beneficiary seeks to retain the priority date of an earlier petition approved on her behalf. *See* 8 C.F.R. § 204.5(e) (entitling a beneficiary of multiple petitions to the earliest priority date).

[6] In any future filings in this matter, the Petitioner must submit a copy of an annual report, federal income tax return, or audited financial statements for 2014 pursuant to 8 C.F.R. § 204.5(g)(2).

[7] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

The amounts on the Forms W-2 do not equal or exceed the annual proffered wage of $97,500. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary.

However, we credit the Petitioner's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid the Beneficiary in 2012 and 2013, or $57,500 and $48,499.96, respectively.

The Petitioner's federal income tax returns reflect annual net income amounts of $240,589 in 2012 and $103,478 in 2013.[8] Both of these amounts exceed the differences between the annual proffered wage and the Petitioner's payments to the Beneficiary in 2012 and 2013. The record therefore demonstrates the Petitioner's ability to pay the Beneficiary's individual proffered wage.

However, as stated in the Director's RFE, USCIS records show the Petitioner's filing of multiple I-140 petitions. USCIS records indicate the Petitioner's filing of 26 petitions for other beneficiaries from the instant petition's priority date of December 17, 2012 to the RFE's issuance on December 3, 2014.[9] USCIS records also indicate the Petitioner's filing of three other petitions before the instant petition's priority date that remained pending after that date.[10]

A petitioner must demonstrate its continuing ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2). Therefore, the instant Petitioner must demonstrate its continuing ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions that remained pending after the instant petition's priority date. The Petitioner must establish its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until the petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

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[8] The record indicates the Petitioner's filing of its federal income tax returns as an S corporation. S corporations with adjustments to incomes from sources other than their trades or businesses report reconciled, annual net income amounts on Schedules K to their IRS Forms 1120S, U.S. Income Tax Returns for S Corporations. *See* Internal Revenue Serv., Instructions to Form 1120S, 22, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed Jan. 7, 2016). Because the Petitioner reported adjustments to its income from outside sources in 2012, we consider the reconciled amount of $240,589 on line 18, Schedule K of its 2012 IRS Form 1120S to reflect its annual net income amount for that year.

[9] USCIS records identify the other petitions by the following receipt numbers:

[10] USCIS records identify these three additional petitions by the following receipt numbers:

In response to the Director's RFE, the Petitioner submitted a chart identifying five other I-140 petitions that it filed after the instant petition's priority date. As previously indicated, the Petitioner also submitted copies of IRS Forms W-2 indicating its payments to the beneficiaries of the petitions in 2013.

However, the Petitioner did not provide information about the 21 other petitions that it filed from the instant petition's priority date until the issuance of the Director's RFE, or the three petitions that it filed before the instant petition's priority date but that remained pending after that date. The record does not document the priority dates or proffered wages of these other petitions, or whether the Petitioner paid wages to their beneficiaries. The record also does not indicate whether any of these other petitions were withdrawn, revoked, or denied, or whether any of the other beneficiaries obtained lawful permanent residence. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

In addition, the Petitioner stated total proffered wages for the five pending petitions identified by it of $432,630, and its total payments to their beneficiaries in 2013 of $162,088.08. The difference between the proffered wages and the wages paid by the Petitioner in 2013 is $270,541.92. The Petitioner's 2013 annual amounts of net income ($103,478) and net current assets ($233,537) do not equal or exceed this amount. The record therefore does not demonstrate the Petitioner's ability in 2013 to pay the proffered wages of the five beneficiaries it identified, let alone the proffered wages of the 24 other petitions that remained pending after the instant petition's priority date.

The Petitioner argues that it need only pay portions of two proffered wages that occurred after the pending petitions' respective priority dates of July 31, 2013 and August 3, 2013. However, the record does not indicate the beneficiaries' receipts of the entire amounts stated on their Forms W-2 after the respective priority dates. Rather, it appears that the Forms W-2 reflect payments to the beneficiaries over the entire year of 2013. We will not consider 12 months of payments to demonstrate an ability to pay five-month periods of proffered wages. Absent evidence of the beneficiaries' receipt of sufficient wages after their respective priority dates, we require the Petitioner to demonstrate its ability to pay the full, annual proffered wages of all its beneficiaries in 2013.

The Petitioner also argues that it had additional funds available in a bank account to pay proffered wages in 2013. The record contains copies of 2013 bank account statements of the Petitioner indicating an average, end-of-month balance of $62,035.21.

However, the funds in the bank account appear to be included in the "cash" amount of $268,145 stated on Schedule L of the Petitioner's 2013 Form 1120S. We considered those assets in determining the Petitioner's net current assets in 2013. The record does not indicate that the funds in the bank account supplement the Petitioner's stated net current assets for 2013. We therefore will not consider the funds in the bank account as available to pay proffered wages.

As previously indicated, pursuant to *Sonegawa*, we may consider other evidence of a petitioner's ability to pay a proffered wage. In *Sonegawa*, the petitioner conducted business for more than 11 years, routinely earning gross annual incomes of about $100,000 and employing at least four, full-

time workers. *Sonegawa*, 12 I&N Dec. at 612. During the year of the petition's filing, however, the petitioner's federal tax returns did not reflect its ability to pay the proffered wage. *Id.* at 614. In that year, the petitioner relocated its business, causing it to lease two locations for a five-month period, to incur substantial moving costs, and to briefly suspend its business operations. *Id.* Despite the financial setbacks, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established its ability to pay. The record established the petitioner as a fashion designer whose work had been featured in national magazines. *Id.* at 615. Her clients included the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed California. *Id.*

As in *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. We may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since 2011. The Form I-140 and accompanying labor certification state the Petitioner's employment of 31 people. However, as previously indicated, the February 6, 2015, letter of the Petitioner's former president/sole shareholder states its employment of only 25 workers. Copies of the Petitioner's 2012 and 2013 federal income tax returns reflect increasing gross annual revenues, and amounts of salaries and wages paid.

Unlike in *Sonegawa*, however, the instant record does not indicate the occurrence of any uncharacteristic business expenditures or losses, or the Petitioner's outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service.

Also unlike in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay multiple beneficiaries and did not provide requested information about all of its pending petitions. *See* 8 C.F.R. § 103.2(b)(14) (stating that "[f]ailure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request"). Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision and dismiss the appeal.

## III. THE BENEFICIARY'S QUALIFYING EXPERIENCE

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§

103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of the offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

A petition for an advanced degree professional must also establish a beneficiary's possession of a U.S. advanced degree or foreign equivalent degree, or a U.S. Bachelor's degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(3)(i); *see also* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" as a U.S. academic or professional degree, or a foreign equivalent degree, above that of baccalaureate).

In the instant case, the accompanying labor certification states the minimum requirements of the offered position of software engineer as a Bachelor's degree or foreign equivalent degree in computer science, engineering, mathematics, or a related field, plus 60 months of experience in the job offered or as a computer/engineering professional. Part H.11 of ETA Form 9089 also states: "Experience must include utilizing: Java, XML, Oracle, DataStage, SQL Server, QTP, Quality Center, Informatica, Clear Case, Clear Quest, Web Services, DB2, TOAD, UNIX."

The Beneficiary attested on the accompanying labor to about 70 months of full-time experience as a computer professional before the Petitioner began employing her on April 24, 2012. The Beneficiary stated the following experience:

- About 16 months with [redacted] in the United States from November 29, 2010 to March 30, 2012;
- About 32 months with [redacted] in the United States from March 17, 2008 to November 28, 2010;
- About 10 months with [redacted] in the United States from April 9, 2007 to February 4, 2008; and
- About 12 months with [redacted] in India from April 3, 2006 to April 4, 2007.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(g)(1). The letters must provide the names, addresses, and titles of the employers, and descriptions of a beneficiary's experience. *Id.*

The record contains evidence regarding the Beneficiary's experience with [redacted] The Petitioner did not submit any evidence of the Beneficiary's claimed qualifying experience with [redacted]

A. The Beneficiary's Claimed Qualifying Experience with

In response to the Director's RFE, the Petitioner submitted a May 15, 2012, letter from a manager on stationery. The letter states full-time employment of the Beneficiary as a senior associate - projects from November 29, 2010 to March 20, 2012. The letter states the Beneficiary's duties and indicates her experience with the required technologies.
The May 15, 2012, letter complies with 8 C.F.R. § 204.5(g)(1) and is consistent with other evidence of record. The letter therefore establishes the Beneficiary's possession of 16 months of qualifying experience with

B. The Beneficiary's Claimed Qualifying Experience with

The record contains an April 4, 2007, letter from a human resources manager on stationery. The letter states employment of the Beneficiary as a programmer analyst from April 3, 2006 to April 4, 2007.

However, the letter does not describe the Beneficiary's experience pursuant to 8 C.F.R. § 204.5(g)(1). The letter also does not state her experience with the required technologies specified in Part H.11 of ETA Form 9089. The letter therefore does not establish the Beneficiary's claimed qualifying experience with

If required evidence is unavailable, a petitioner must demonstrate its unavailability before we can consider other evidence, such as affidavits from non-parties with direct, personal knowledge of the events in question. 8 C.F.R. § 103.2(b)(2)(i).

In the instant case, the Petitioner submitted affidavits from the Beneficiary and a purported former coworker of hers at The affidavits state full-time employment of the Beneficiary as a programmer analyst from April 3, 2006 to April 4, 2007. The affidavits also describe her duties and experience with the required technologies.

However, the Beneficiary's affidavit is self-serving and does not reflect independent, objective evidence of her claimed qualifying experience. The record also does not demonstrate the unavailability of a required letter from pursuant to 8 C.F.R. § 204.5(g)(1). In addition, the record lacks evidence to corroborate employment of the Beneficiary's purported former coworker during the relevant period. *See Matter of Soffici*, 22 I&N 158, 165 (Comm'r 1998) (citation omitted) (finding that unsupported assertions are insufficient to meet the burden of proof in visa petition proceedings).

For the foregoing reasons, the record therefore does not establish the Beneficiary's claimed qualifying experience with

C. The Beneficiary's Claimed Qualifying Experience with

The record contains two letters on stationery: a September 13, 2013, letter from a supervisor; and a January 16, 2015, letter from a human resources manager. Pursuant to 8 C.F.R. § 204.5(g)(1), both letters state employment of the Beneficiary as a programmer analyst from March 17, 2008 to November 28, 2010, and describe her duties and experience with the required technologies.

However, the Director found that the record did not establish the Beneficiary's employment by for the entire claimed period of March 17, 2008 to November 28, 2010. The Director's RFE requested additional evidence of the Beneficiary's claimed employment by because the company allegedly "benched" H-1B nonimmigrant workers, resulting in its debarment from obtaining approved immigrant or nonimmigrant petitions for a one-year period from September 2012 to September 2013. *See* INA § 212(n)(2)(c)(i), 8 U.S.C. § 1182(n)(2)(c)(i) (imposing one- or two-year bars on approvals of petitions by H-1B employers found by the DOL to have violated certain labor condition application (LCA) regulations).

In addition to the 2015 letter from the Petitioner's response to the Director's RFE included copies of IRS Forms W-2 issued to the Beneficiary by The Forms W-2 indicate payments to the Beneficiary by of $30,113 in 2008, $14,145.55 in 2009, and $63,917.49 in 2010.[11]

The Director found that the Forms W-2 indicate failure to pay the Beneficiary at the required H-1B salary rate of $50,000 per year in 2008 and 2009. The Director therefore found that the record indicated "benching" of the Beneficiary in those years and did not establish the Beneficiary's employment by for the entire 32-month period claimed by her.

The term "benching" refers to paying H-1B workers less than their required wages for non-productive time, excluding non-productive time resulting from workers' own initiatives or inabilities to work. U.S. Dep't of Labor, Emp't & Training Admin., Proposed Labor Condition Application Rules, 64 Fed. Reg. 628, 647 (Jan. 5, 1999). Benching most frequently occurs "where the employer lacks work to assign to the H-1B worker, or the worker is engaged in training or development activities (such as orientation in the employer's operation or studying for a licensing exam)." *Id.*

The record contains a copy of an approval notice, indicating authorization to employ the Beneficiary in H-1B status from May 1, 2009 to April 30, 2011. Under portability provisions, the earliest would have been responsible for paying the required annual proffered wage of $50,000 was April 27, 2009, the filing date of the H-1B petition. *See* INA § 214(n)(1), 8 U.S.C. § 1184(n)(1) (authorizing an H-1B worker to accept new employment upon the filing of new H-1B petition on his or her behalf).

[11] The record contains two 2010 IRS Forms W-2 for the Beneficiary: one issued by and the other issued by a different company. The Petitioner submitted documentation establishing the issuer of the other Form W-2 as a professional employer organization (PEO) that began administering payroll under the PEO's name in 2010. Like the Director, we therefore consider both Forms W-2 for 2010 to reflect payments issued to the Beneficiary by .

Thus, contrary to the Director's finding, the record does not indicate obligation to pay the Beneficiary at an H-1B annual wage rate of $50,000 in 2008.[12] payment of $30,113 to the Beneficiary in 2008 therefore does not indicate "benching" of the Beneficiary and her failure to work for for the claimed period in 2008 beginning on March 17.

payment of $14,145.55 to the Beneficiary in 2009, however, suggests that she did not work 12 full months for the company that year as claimed. was required to pay the Beneficiary at least $33,333.32 in prorated H-1B wages from May 1, 2009 through the end of the year. payment of $19,187.77 less than required in H-1B wages suggests that the Beneficiary did not work for significant periods in 2009.

was investigated by the DOL's Wage and Hour Division as a willful violator employer of the H-1B program. Public records show that appealed the DOL findings to an administrative law judge. *See* (accessed Jan. 11, 2016). The judge approved a settlement in which agreed to pay amended amounts of fines and back wages, and to endure a one-year bar on approvals of its petitions. *Id.*

The record does not identify specific H-1B workers found to merit back wages from USCIS records do not contain a copy of the terms of the settlement between and the DOL, and the agreement is not publicly available. The record therefore lacks direct evidence of whether "benched" the Beneficiary in 2009.

Beneficiaries who received less than their required H-1B wages do not necessarily lack qualifying experience during those periods. *See Matter of B&B Residential Facility*, 01-INA-00146, 2002 WL 1586297, *3 (BALCA July 16, 2002) (finding that unpaid experience can constitute qualifying experience). However, the instant record does not establish the Beneficiary's claimed 32 months of qualifying experience with

The DOL's findings that failed to pay required wages to H-1B workers and the company's payment of only $14,145.55 to the Beneficiary in 2009 cast substantial doubt on the Beneficiary's claim of 12 months of qualifying employment by that year. Rather, the amount of wages paid to the Beneficiary indicates her possession of only about four months of qualifying experience in 2009.

[12] Although apparently unauthorized, the Beneficiary's employment by in 2008 and part of 2009 may still constitute qualifying experience. *See Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (holding that a foreign national's acquisition of qualifying experience through unauthorized employment in the United States does not support discretionary denial of adjustment of status). However, the accrual of more than 180 days of unauthorized employment in the United States would jeopardize the Beneficiary's ability to adjust her status to that of a lawful permanent resident. *See* INA § 245(k), 8 U.S.C. § 1255(k) (allowing an I-140 beneficiary to adjust status if she failed to maintain status, worked without authorization, or otherwise violated the terms of her admission for 180 days or less).

Despite receiving notice of evidence indicating the Beneficiary's "benching," the Petitioner did not establish the Beneficiary's claimed 12 months of full-time employment in 2009. The 2015 letter from does not address the Director's "benching" concerns or explain the company's payment of the relatively small amount of wages to the Beneficiary in 2009. *See Matter of Ho*, 19 I&N Dec. 582, 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

Also, on a prior labor certification filed on her behalf, USCIS records indicate the Beneficiary's attestation to about a two-month gap in her employment with between March 12, 2009 and May 1, 2009. The inconsistencies between the current and prior labor certifications cast further doubt on the Beneficiary's claimed period of qualifying employment with *See id.*

On appeal, the Petitioner argues that the Beneficiary may use qualifying experience gained with because her employment predated the company's period of debarment. However, the timing of the Beneficiary's work before the debarment period does not establish her entire claimed period of qualifying experience with The record indicates that LCA violations occurred before, not during, imposition of the one-year bar from July 2012 to July 2013. The Beneficiary's claimed 12 months of full-time experience with in 2009 therefore remains in doubt.

For the foregoing reasons, the record establishes the Beneficiary's possession of only about 24 of the claimed 32 months of qualifying experience with (nine months in 2008, four months in 2009, and 11 months in 2010). Thus, the record indicates the Beneficiary's possession of about 40 months of qualifying experience: about 16 months with and about 24 months with

The record does not establish the Beneficiary's possession of at least 60 months of qualifying experience by the petition's priority date as required for the offered position and the requested immigrant classification. We will therefore also affirm the Director's decision on this ground.

## IV. CONCLUSION

The record does not establish the *bona fides* of the job offer, the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward, or the Beneficiary's possession of the qualifying experience for the offered position or the requested classification. We will therefore affirm the Director's denial of the petition and dismiss the appeal on these grounds.

The petition will be denied for the reasons stated above, with each considered an independent and alternative basis of denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of S-T- Inc.*, ID# 15766 (AAO Mar. 8, 2016)